



ORTHO

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Consumer Products Division

October 26, 1982

OSHA Proposed Hazard Communication
Standard - Additional Comments

Mr. Tom Hall
Room N-3635
OSHA Division of Consumer Affairs
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Mr. Hall:

This letter is being submitted by the Ortho Consumer Products Division of Chevron Chemical Company for the purpose of advising OSHA of our further thoughts on the matter of the Occupational Safety and Health Administration's proposed Hazard Communication Standard. I presented written and oral testimony at the July 20, 1982, hearing in Los Angeles, California on that subject. I submitted further written comments on this subject to you on August 10, 1982.

OSHA's stated goal in developing the proposed hazard communication standard is:

" * * * to provide employees with the information they need to protect themselves in the workplace (hazard identification and warning) through a simple performance-oriented standard" (47 F.R. 12101, March 19, 1982).

The proposed standard would require chemical manufacturers to assess the hazards of chemicals which they produce and would require employers to provide information about these hazards to employees who use the chemicals. The use of labels, material safety data sheets and training sessions are the means of communication chosen to achieve the goal (47 F.R., supra, at pp. 12092 and 12101). OSHA's proposed requirements admittedly "are intended to protect workers from potential hazards, not to provide protection for non-worker consumers" (47 F.R., supra, at p. 12104).

Chevron Chemical Company ("Chevron") respectfully submits that the U.S. Environmental Protection Agency ("EPA") has preempted OSHA's jurisdiction to promulgate such a hazard communication standard to the extent it concerns the use of consumer pesticides* in the workplace.

* Pesticide products may be categorized as agricultural or consumer pesticides. Agricultural pesticides include those packaged and sold primarily for use in connection with agricultural production or other such large applications. Consumer pesticides are those packaged and sold at retail for use by the general public. Consumer products may incidentally be sold to an employer or the employer's employees, in the same form, approximate amount, concentration and labeled in the same manner as they are sold to the general public.

Additionally, Chevron respectfully submits that, with respect to consumer pesticides, OSHA cannot satisfy its burden of proving that the proposed standard is reasonably necessary and appropriate to remedy a significant risk of material health impairment.

The EPA has preempted OSHA's jurisdiction in the area as EPA already has exercised its statutory authority over hazard identification and warnings to advance the safe use of consumer pesticides in the workplace. Because of the thoroughness with which EPA has exercised its authority in this regard, OSHA's proposed standard is not reasonably necessary and appropriate for its stated purpose.

I. OSHA'S JURISDICTION OVER CONSUMER PESTICIDES HAS BEEN RESTRICTED BY EPA'S EXERCISE OF ITS REGULATORY AUTHORITY.

Section 4(b)(1) of the Occupational Safety and Health Act (29 U.S.C. § 651, et seq. ("OSH Act")) provides:

"Nothing in this /Act/ shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health" (29 U.S.C. § 653 (b)(1)).

The statutory term "working conditions":

"* * * embraces both 'surroundings,' such as the general problem of the use of toxic liquids, and physical 'hazards,' which can be expressed as a location (maintenance shop), a category (machinery), or a specific item (furnace)" (Southern Pac. Transp. Co. v. Usery (5 Cir. 1976) 539 F.2d 386, 391), certiorari denied (1977) 434 U.S. 874.

Any EPA exercise of its authority directed at safe and healthful use of consumer pesticides by an employee in the workplace displaces OSHA coverage of that working condition (Southern Pac. Transp. Co., supra, 539 F.2d 386, at 391).

Section 4(b)(1) of the OSH Act does not require that EPA exercise its authority in the same manner or in an equally stringent manner as OSHA proposes (Southern Ry. Co. v. Occupational Saf. & H. Review Comm. (4 Cir. 1976) 539 F.2d 335, 339 at fn. 19, certiorari denied (1976) 429 U.S. 999; Columbia Gas of Pennsylvania, Inc. v. Marshall (3 Cir. 1980) 636 F.2d 913, 918). In this case, however, EPA regulations and standards cover the specific working conditions which OSHA proposes to govern and do so in a substantially similar manner. Thus, EPA's preemption of OSHA jurisdiction is a reasonable result and effectuates the purpose of section 4(b)(1) which is to eliminate duplication in the efforts of Federal agencies to secure the well being of employees (Organized Migrants in Commun. Act., Inc. v. Brennan (D.C. Cir. 1975) 520 F.2d 1161, 1167).

The jurisdiction of EPA encompasses the identification, testing, registration and informational labeling of all pesticides (Federal Insecticide, Fungicide and Rodenticide Act, as amended 7 U.S.C. § 136, et seq. ("FIFRA")). The whole purpose of FIFRA is to protect man and the environment; thus, there is no question that workers using consumer pesticides fall within that category (see, Organized Migrants in Commun. Act., Inc., supra, 520 F.2d 1161, 1168).

EPA requires that information designed to protect human health and the environment be transmitted to any potential user by inclusion on the product label (40 C.F.R. § 162.10). The label must include, among other information, an ingredients statement, signal words indicating the potential health effects from exposure to the product, precautionary statements addressing potential physical and chemical and human health hazards, a statement concerning recommended treatment in the event of exposure and directions for the safe use, storage and disposal of the product (40 C.F.R. § 162.10). All use restrictions must be set forth on the product label (40 C.F.R. § 162.10(j)). It is a Federal offense to use a pesticide in a manner inconsistent with its label. A violator is subject to both civil and criminal liability (FIFRA, 7 U.S.C. § 136j).

Before EPA registers a consumer pesticide, the EPA makes the determination that the pesticide labeling complies with the requirements of FIFRA and that the pesticide will not generally cause unreasonable adverse effects on man or the environment (FIFRA, 7 U.S.C. § 136(c)(5)). Because the use of a consumer pesticide product by an employee in his workplace does not differ from the use by the general consumer, EPA's regulatory scheme protects the consumer and the employee equally.

EPA's comprehensive regulation of consumer pesticides, pursuant to its statutory authority, preempts OSHA's jurisdiction over health and safety of consumer pesticides, at least insofar as OSHA's duplicative hazard communication proposal is concerned. EPA's regulation is directed toward the controlled and informed use of all consumer pesticides and the regulations govern regardless of the setting in which a pesticide is used.

II. OSHA'S PROPOSED HAZARD COMMUNICATION STANDARD IS NOT REASONABLY NECESSARY AND APPROPRIATE TO REMEDY A SIGNIFICANT RISK OF MATERIAL HEALTH IMPAIRMENT.

The U.S. Supreme Court recently has made it clear that OSHA must find that the proposed standard "is reasonably necessary and appropriate to remedy a significant risk of material health impairment" (Industrial Union Dept. v. American Petrol. Inst. (1980) 448 U.S. 607, 639, see also pp. 646 and 662-663). This requirement establishes a basis, independent of preemption, for finding that OSHA's proposed standard should not apply to consumer pesticides.

OSHA no doubt will be able to sustain its burden of making this showing in regard to many hazardous substances. Chevron respectfully submits, however, that OSHA cannot do so with respect to consumer pesticides. Because of the comprehensive regulation of consumer pesticides by EPA, as described above, and its determination that each such registered pesticide will not generally cause unreasonable adverse effects on man or the environment, no significant risk can be found which would be remedied by OSHA's proposed standard.

III. CONCLUSION.

In regard to the nature and object of the standard currently proposed by OSHA, Chevron believes that EPA has preempted OSHA's jurisdiction because of EPA's extensive regulation of pesticide registration and hazard communication. Our

Mr. Tom Hall

-4-

October 26, 1982

position is supported by the Chemical Specialties Manufacturers Association (CSMA), an organization representing more than 400 manufacturers of home and institutional specialty chemicals, including pesticides. Moreover, because of EPA's efforts in the area, there is no significant risk of harm to workers who use consumer pesticides. Accordingly, Chevron recommends that OSHA exempt consumer pesticides from the effect of the proposed standard. This exemption could be accomplished by use of the language proposed by Chevron in its earlier comments or by other appropriate language.

Respectfully submitted,

William L. Chase, Jr.

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